IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. HICKS, Petitioner, v. GEORGE W. BUSH, President of the United States; DONALD RUMSFELD, United States Secretary of Defense; GORDON R. ENGLAND, Secretary of the United States Navy; JOHN D. ALTENBURG, JR., Appointing Authority for Military Commissions, Department of Defense; Brigadier General JAY HOOD, Commander, Joint Task Force, Guantanamo Bay, Cuba, and Colonel BRICE A. GYURISKO, Commander, Joint Detention Operations Group, Joint Task, Guantanamo Bay, Cuba Respondents, all sued in their individual and official capacities.	Civ. Act. No. 1:02-cv-00299-CKK Judge Kollar-Kotelly

PETITIONER DAVID M. HICKS'S
MOTION TO STAY MILITARY COMMISSION PROCEEDINGS

Petitioner David M. Hicks, by his attorneys, respectfully moves this Court for an order staying the military commission proceedings in Guantanamo Bay, Cuba ("Motion to Stay") until the later of this Court's decision on Mr. Hicks's Motion for Partial Summary Judgment or the United States Supreme Court's decision in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted*, 74 U.S.L.W. 3108 (U.S. Nov. 7, 2005) (No. 05-184).

In his Revised Brief In Support Of Petitioner David M. Hicks's Cross-Motion For Partial Summary Judgment ("Mr. Hicks's Revised Brief," D182)[1], Mr. Hicks explained *inter alia* that the military commission lacks jurisdiction over the charges against him and that the structural bias of the commission process renders it unconstitutional. Mr. Hicks

[1] Documents that are filed and in the Court's docket are indicated by D__.

further explained that under *Hamdan*, he has a right to have these issues adjudicated now, before the commission process occurs. If the commission process were to begin before adjudication of Mr. Hicks's challenges, however, and certainly if the government were to proceed with trial, Mr. Hicks's asserted right to pre-commission adjudication of these challenges would have been effectively nullified before this Court evaluated Mr. Hicks's claims. As a result, unless this Court intends to adjudicate Mr. Hicks's challenges prior to November 18, it must stay the military commission process at least until this Court resolves those challenges.

In addition, Mr. Hicks has previously raised the same substantive challenges to the commission process that are directly at issue in *Hamdan*. In particular, Mr. Hicks has argued that (1) any trial by military commission violates the principle of separation of powers as such commissions had not been authorized by Congress, and (2) the processes established for military commissions violate the Geneva Conventions. In *Hamdan*, the D.C. Circuit held that petitioner was entitled to pre-commission adjudication of both of these challenges. While the D.C. Circuit resolved these challenges against Hamdan, the Supreme Court has now granted certiorari to reevaluate these challenges. It is not, however, reevaluating the D.C. Circuit's decision that these challenges should be evaluated before the commission process occurs. As a result, a Supreme Court decision reversing the D.C. Circuit will necessarily mean that (a) the commission process against Mr. Hicks is illegitimate, and (b) Mr. Hicks is entitled to have that process stopped before it begins. If, however, the military commission process against Mr. Hicks were already to have occurred, Mr. Hicks's right in this regard will have been effectively nullified, just as it would if that process were to occur before resolution of Mr. Hicks's other

challenges. As a result, this Court should stay the military commission process not only until it has decided the challenges raised in Mr. Hicks's Revised Brief, but also until the Supreme Court resolves *Hamdan*.

We are not asking this Court to stay its own evaluation of the challenges raised in Mr. Hicks's Revised Brief. If this Court stays the commission proceedings, it may wish for reasons of judicial economy to stay its own proceedings as well until *Hamdan* is decided. After all, if Hamdan prevails, this likely will obviate the need to resolve Mr. Hicks's other challenges to the commission process. However, there are compelling reasons for this Court to proceed. Mr. Hicks's independent challenges to the commissions are compelling and numerous, and if the Supreme Court were to affirm the D.C. Circuit, these issues would still need to be resolved. Given the length of time it has taken to resolve the preliminary questions in this case concerning the legitimacy of the commission process, there is significant value in resolving these challenges simultaneously with resolution of the challenges directly at issue in *Hamdan*.

What is critical, however, is that the commission process not go forward while Mr. Hicks has viable claims that the military commissions should be stopped. Here, Mr. Hicks's claims are more than viable. As Mr. Hicks's briefs on the merits show, he is entitled to prevail. And the harm to him if the commission process proceeds would be irreparable as his right to pre-commission review will have been lost. And, as detailed below, the content of the proceedings and public revelation of the evidence in those proceedings (much of which will likely be ultimately deemed inadmissible under the Due Process Clause), as well as the results of those proceedings before a biased tribunal, likely will incurably prejudice Mr. Hicks. In contrast, there is no harm to the government

from a stay of proceedings that the government took years to initiate and that were subsequently stayed for many months at the government's own request.

In support of this Motion to Stay, Mr. Hicks states as follows:

Current Status

1. At this Court's direction, in the wake of *Hamdan*, on August 17, 2005, Mr. Hicks submitted to the Court his Revised Brief. On the same date, the Respondents submitted their Renewed Response And Motion To Dismiss Or For Judgment As A Matter Of Law With Respect To Petitioner's Challenges To The Military Commission Process. (D174.) On August 31, 2005, Mr. Hicks submitted his Opposition To Respondent's Motion To Dismiss And Reply Brief In Support Of His Motion For Partial Summary Judgment ("Mr. Hicks's Reply Brief," D183), and the Respondents submitted their Memorandum Of Law In Opposition To Petitioner's Revised Brief In Support Of Petitioner's Cross-Motion For Partial Summary Judgment. (D180.) Both the Government's Motion to Dismiss and Mr. Hicks's Motion are now fully briefed and before this Court for decision.

2. On September, 20, 2005, John D. Altenburg, Jr., the Appointing Authority in Mr. Hicks's military commission case, issued an amended order lifting the stay in Mr. Hicks's case, replaced members of the commission panel, and ordered the Presiding Officer to convene, "if practical, a session without the other members of the military commission within the next thirty days to resolve motions and any other matters as deemed appropriate by the Presiding Officer."[2] (Attached as Exhibit 1, at 2.) The

[2] On the same date, September 20, 2005, Mr. Hicks submitted this amended order to the Court in his Notice Of Additional Supplemental Authority Of Petitioner David M. Hicks Regarding Respondents Lifting Of The Stay Of Military Commission Proceedings. (D188.)

amended order also provides that "as expeditiously as possible following the initial session" Mr. Hicks's trial should begin on the merits. (Exhibit, 1 at 2).

3. Pursuant to this amended order, Respondents quickly set an initial session in the military commission case to begin on November 18, 2005 in Guantanamo Bay, Cuba. At the initial session, the commission is scheduled to hear and decide at least 36 pre-trial motions concerning Mr. Hicks's case.

4. On November 7, 2005, the United States Supreme Court granted *certiorari* in the *Hamdan* case.[3]

Mr. Hicks Is Likely to Prevail on the Merits.

5. For all of the reasons set forth in his Revised Brief, Mr. Hicks is likely to prevail on the challenges and arguments set forth therein. Mr. Hicks will not repeat those arguments here. In addition, the Supreme Court's grant of *certiorari* in *Hamdan* indicates a likelihood that the challenges brought by Hamdan, which directly impact this case, have merit as well.

6. This Court adjudicates requests for a stay or for a preliminary injunction on a sliding scale. If there is irreparable harm, it will grant a stay so long as there is some reasonable likelihood the petitioner will prevail on the merits. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977). Moreover, the *Hamdan* court explained, even under *Councilman*, a challenge to military commissions should be adjudicated pre-commission where the petitioner has raised any

[3] In its opposition to certiorari in Hamdan, as it has here, the government argued that Supreme Court review was premature. It asserted, for example, that "[further proceedings before the military commission may make it unnecessary for this Court to address any number of the questions currently presented in the case." The Supreme Court nonetheless granted certiorari, finding the issues warranted review now.

substantial arguments that the military commission has no jurisdiction. *Hamdan*, 415 F.3d at 36-37. Here, the grant of *certiorari* alone indicates there are substantial arguments to that effect. And the D.C. Circuit's decision in *Hamdan* alone establishes the irreparable harm of proceeding.

Mr. Hicks Will Suffer Irreparable Harm If The Commission Process Is Not Stayed.

7. The *Hamdan* court recognized that military commission proceedings will cause harm to an accused if they go forward when the accused has asserted "jurisdictional" challenges to the commission process. 415 F.3d at 36. Because Mr. Hicks has asserted such challenges, even the preliminary proceedings starting on November 18, 2005, will irreparably harm him if they proceed prior to this Court's decision of his Motion. As demonstrated in his briefs, Mr. Hicks has a right to have these issues adjudicated pre-trial by an impartial tribunal. And so long as he has a substantial argument to that effect, this Court should not permit the commission to proceed. Thus, it should not let the commission proceed until it has at least evaluated Mr. Hicks's claims of the right to pre-trial adjudication and until the Supreme Court has resolved the additional claims at issue in *Hamdan*.

8. *Hamdan* ruled that courts have jurisdiction to review a habeas challenge to a military commission accused before a trial on the merits. *Id.* at 36-37. In reaching this conclusion, the D.C. Circuit noted that there was no need to abstain from considering challenges to military commission proceedings against aliens in order to protect military discipline, as was the case in court martial proceedings. *Id.* at 36 (citing *Schlesinger v. Councilman*, 420 U.S. 738 (1975); *New v. Cohen*, 129 F.3d 639 (D.C. Cir. 1997)). The court continued that even where the abstention rationale applies, an accepted exception

provides that "a person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him." (*Id., quoting New*, 129 F.3d at 644). The court cited *Abney v. United States*, 431 U.S. 651, 662 (1977), in holding that "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." *Hamdan*, 415 F.3d at 36.

9. Pursuant to the Court's decision in *Hamdan*, Mr. Hicks has asserted in his Motion a right to pre-commission adjudication of his challenges to the commission. He has asserted, for example, that the commission has no jurisdiction over the charges raised against him. And the thrust of his Due Process challenge is that, "by virtue of the subjective and wholly discretionary process in which the various panel members are appointed per the terms of the commission's organic orders and regulations, the commission was not impartially constituted, is unlawful, and, therefore, cannot try Mr. Hicks or any of the other detainees." (Mr. Hicks's Reply Brief at 33.) Similarly, Mr. Hicks's Equal Protection challenge is that the organic order establishing the commission is unlawful in that it establishes a commission process for non-citizens but not for citizens. Finally, along with these challenges, Mr. Hicks initially raised and continues to press the very challenges at issue in *Hamdan* -- namely, the issues on which the D.C. Circuit explicitly found there was a right to have a pre-commission adjudication.

10. In many ways, Mr. Hicks's argument that a military commission has no jurisdiction is analogous to an argument in an ordinary commercial case that the district court has no jurisdiction because there is an agreement to arbitrate. In such cases, even when a district court decides there is no right to arbitrate, the petitioner is entitled to a stay pending appeal so long as his appeal is not frivolous. To allow district court

proceedings to continue pending the appeal, courts have held, would obviate the very right to arbitrate being asserted on appeal. *Blinco v. Green Tree Servicing, LLC,* 366 F.3d 1249, 1251 (11th Cir. 2004). Similarly, to allow the military commissions to proceed before all of Mr. Hicks's challenges to that process have been evaluated would obviate the very rights Mr. Hicks is asserting.

11. In addition, the D.C. Circuit has previously held that the injury suffered by a party required to participate in proceedings overseen by a partial judicial authority whom the party has objected to, is by its nature irreparable. *See Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003). In *Cobell*, the Court found that if the partial proceedings continue and the party is forced to participate,

> [t]he remedy by appeal is inadequate. It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.

Id. at 1139 *(citations omitted).*

12. Here, Mr. Hicks has raised precisely such a challenge to the partiality of the military commissions. Mr. Hicks explained that the structure of the military commissions "fuses together the legislative, executive and judicial functions in a single body, undermining our constitutionalism and with it the rule of law." (Revised Br. at 46.) Indeed, "two senior military prosecutors have complained that the trial system was secretly arranged to improve the chance of conviction and to deprive defendants of material that could prove their innocence." (*Id.* at 46-47, *citations omitted*.) Moreover, public statements and press releases circulated by the office of the Appointing Authority

have asserted Mr. Hicks's guilt.[4] Respondents assertion that these statements were not authorized hardly changes the fact that they demonstrate the structural bias of the process.

13. The irreparable harm from the commission process will begin on November 18, 2005. To date, 36 defense motions are scheduled to be decided by the military commission at that preliminary hearing. These motions include: motions to dismiss charges, motions to re-classify charges, and motions objecting to the structure of the commission process as unfair and partial. In the absence of a stay, these motions will be heard by the very same authority that Mr. Hicks has challenged as structurally biased. These motions will directly impact the nature and scope of Mr. Hicks's military commission trial. And without an impartial tribunal the likely denial of these motions will cause Mr. Hicks irreparable harm.

14. Even if ultimately invalidated in a habeas challenge, a trial would irreparably harm Mr. Hicks. It would give the prosecution a dry run and a free look at Mr. Hicks's defense, which would have to present its entire case between now and a ruling in *Hamdan*. *See, e.g.*, *Rafeedie v. INS*, 880 F.2d 506, 517 (D.C. Cir. 1989) (holding that, even in an immigration context, a "substantial practical litigation advantage" is lost by forcing someone to go through a summary proceeding because "if he presents his defense in [the summary] proceeding, and a court later finds that section inapplicable to him, the INS will nevertheless know his defense in advance of any [plenary] proceeding.") Moreover, a conviction on ignominious charges before a worldwide audience would irreparably harm Mr. Hicks even if the commissions are later

[4] On October 7, 2005, Mr. Hicks submitted this memorandum to the Court in his Notice Of Additional Supplemental Authority Of Petitioner David M. Hicks Regarding The Appointing Authority's Bias.

invalidated. An invalid trial also would waste the government's money and pro bono counsel's time and resources.

15. Most fundamentally, Mr. Hicks has the right to have his Motion decided pre-trial, because otherwise, the rights he is asserting -- the right to invalidation of the commission process before it begins -- will be thwarted by the continuation of the commission process while his habeas challenge remains pending. *See e.g. Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249 (11th Cir. 2004.)

16. The government's arguments in their response to petitioner's motion to stay the military commission process will likely be similar to those arguments the government made in its Brief in Opposition to Petitioner's Certiorari petition in Hamdan. (Brief for the Respondents in Opposition to Petitioner's Certiorari petition, attached as Exhibit 2, at 10.) In that brief, the government argued, inter alia, the commission should go forward because:

a) The commission may acquit the petitioner or resolve some or all of his claims; (*Id.*)

b) Having a commission trial would create a record for further review by federal courts; (*Id.*)

c) The decision of the Circuit Court for the District of Columbia was correct; (*Id.*)

d) No prejudice would result to the Petitioner if the commission were to go forward; (*Id.* at 13.)

e) A federal court will be able to review his claims after conviction grants petitioner sufficient safeguards of his right to judicial review of his conviction. (*Id.* at 15.)

Despite these arguments, the Supreme Court granted certiorari in Hamdan. Moreover, despite similar claims, the D.C. Circuit held that Hamdan was entitled to pre-commission review, a conclusion that the Supreme Court is not reviewing.

A Stay Of Military Commission Proceedings Is Necessary and Proper In This Case.

17. Because Mr. Hicks is likely to prevail on the merits of his claim and would be irreparably harmed in the absence of a stay, the commission proceedings should be stayed by this Court until the later of the resolution of the pending motions, or the Supreme Court's decision in *Hamdan*.

18. The issuance of an order in this case staying the military commission proceedings would not prejudice the government. Although Mr. Hicks has challenged and is anxious to end his period of indefinite incarceration, there is no urgency to move forward with his trial until the questions before this Court are resolved. The government has incarcerated him for nearly four years to this date at Guantanamo Bay, Cuba, did not even bring charges against Mr. Hicks for at least 30 months after his arrival, and itself asked for abeyance of proceedings in this Court last Fall pending the D.C. Circuit's decision in *Hamdan*. *Response to Order to Show Cause*, filed 11/29/2004. (D130.) The government's arguments then equally justify a stay now. There, the government argued that judicial economy warranted abeyance because *Hamdan* might require reevaluation of issues if this Court acted in the interim. Similarly, when Hamdan was initially filed in the District of Washington (it was then captioned *Swift v. Rumsfeld*), the government moved that the Court hold the petition in abeyance on the grounds of judicial economy given pending Supreme Court cases that might effect the outcome. (*See* Exhibit 3, Motion for Order Petition in Abeyance, *Swift v. Rumsfled*, No. C04-777RSL**,** at 8-9 (W.D. Wash.

filed April 23, 2004).) The same concern is present here to an even greater extent given that permitting the commission process to continue would mean holding a trial likely to be subsequently invalidated. Allowing the commission proceedings to go forward prior to the Supreme Court's decision in *Hamdan* or this Court's decision on Mr. Hicks's other challenges, each of which could change the landscape in terms of the structure of the commission process, makes no sense. The only potential benefit for the government in moving forward now is the public attention it would receive from the media for trying Mr. Hicks in a system that is likely to be declared invalid for a variety of reasons.

19. In contrast, an order staying the commission proceedings until both this Court and the Supreme Court have rendered their decisions is clearly in the public interest. In the midst of the armed conflict in Iraq and Afghanistan, the public and international opinion have focused increasingly on the treatment of detainees at Guantanamo. As the public has clamored for more scrutiny into the detention facilities at Guantanamo Bay, allowing a trial to proceed that is based on invalid charges, presided over by a partial panel, using processes contrary to international law would be against the public interest.

WHEREFORE, Mr. Hicks respectfully requests this Court to enter an Order staying all military commission proceedings until the later of: this Court's ruling on Petitioner's Motion for Summary Judgment or the Supreme Court's decision in the *Hamdan* case.

Dated: November 8, 2005

Respectfully submitted,
David M. Hicks

By: s/ Marc Goldman
One of His Attorneys

Marc A. Goldman, Esq.
District Bar No. 449230
Michael B. DeSanctis
Eric Berger
Jenner & Block LLP
601 13th St. N.W. Suite 1200 South
Washington, D.C. 20005-3823
(202) 639-6087

Andrew A. Jacobson
David E. Walters
Andrew W. Vail
pro hac vice
Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

Joshua L. Dratel, Esq.
Joshua L. Dratel, P.C.
Civilian Defense Counsel
pro hac vice
14 Wall Street, 28th Floor
New York, New York 10005
(212) 732-0707
Attorney Registration No. 1795954
Attorneys for Petitioner David M. Hicks

Leon Friedman, Esq.
District Bar No. NY0028

148 East 78th Street
New York, New York 10021
(212) 737-0400

Major Michel D. Mori,
U.S. Marine Corps
pro hac vice
Office of Military Commissions
Office of the Chief Defense Counsel
1931 Jefferson Davis Highway, Suite 103
Arlington, Virginia 22202
(703) 607-1521

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. HICKS, Petitioner, v. GEORGE W. BUSH, President of the United States; DONALD RUMSFELD, United States Secretary of Defense; GORDON R. ENGLAND, Secretary of the United States Navy; JOHN D. ALTENBURG, JR., Appointing Authority for Military Commissions, Department of Defense; Brigadier General JAY HOOD, Commander, Joint Task Force, Guantanamo Bay, Cuba, and Colonel BRICE A. GYURISKO, Commander, Joint Detention Operations Group, Joint Task, Guantanamo Bay, Cuba, Respondents, all sued in their individual and official capacities.	Civ. Act. No. 1:02-cv-00299-CKK Judge Kollar-Kotelly

DECLARATION

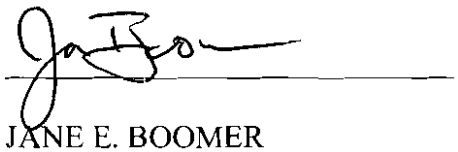
Jane E. Boomer hereby declares, pursuant to 28 U.S.C. § 1746, as follows:

1. I am a commissioned officer in the United States Air Force. I currently work in the Office of Military Commissions. My duties include reviewing press releases and other internal Public Affairs documents drafted by the Office of the Secretary of Defense Public Affairs Office on Commissions issues. Unless otherwise indicated, the statements in this declaration are based upon my personal knowledge and information obtained by me in the course of my official duties.

2. Sometime on or prior to September 20, 2005, I received an electronic copy of a draft document entitled "Military Commission Resumes for David Hicks (Response to Query Only) September 20, 2005," from Major Michael Shavers, Office of the Secretary of Defense, Public Affairs Office, provided to the Court as Exhibit 1 to petitioner's October 7, 2005 Notice of Additional Supplemental Authority. I circulated the document to the staff of the Legal Advisor to the Appointing Authority, but the draft responses were not cleared or reviewed by the Legal Advisor or the Appointing Authority prior to release, and, from the perspective of my office, the responses in the document were never intended to reflect the views of, or to be attributed to, the Appointing Authority.

3. I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 18, 2005.



JANE E. BOOMER

No. 05-184

In the Supreme Court of the United States

SALIM AHMED HAMDAN, PETITIONER

v.

DONALD H. RUMSFELD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
GREGORY G. KATSAS
Deputy Assistant Attorney General
DOUGLAS N. LETTER
ROBERT M. LOEB
ERIC D. MILLER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

court's reading "would obliterate" the distinction the UCMJ draws between them. Pet. App. 14a.

Judge Williams concurred. He took issue only with the court's analysis of Common Article 3, which he believed to be applicable to the conflict with al Qaeda. Pet. App. 18a. Because he agreed with the majority that the Geneva Convention is not enforceable in court and that any claims under Common Article 3 should be deferred until the completion of the military-commission proceedings, Judge Williams "fully agree[d] with the court's judgment." *Id.* at 17a.

ARGUMENT

The decision of the court of appeals is interlocutory. It simply reversed the district court's erroneous decision to enjoin ongoing military commission proceedings a month before the scheduled trial date. Petitioner's trial before a military commission has not yet begun. The military commission may acquit petitioner or may resolve some or all of petitioner's claims in his favor, and some may not even arise (*e.g.*, if classified materials are not presented at trial). In the event petitioner is convicted, an actual trial would create a record that would facilitate any review by this Court. Moreover, the decision of the court of appeals on the merits is correct and does not conflict with any decision of this Court or any other court of appeals. Thus, further review at this time is unwarranted.

1. a. The interlocutory nature of the court of appeals' decision makes plenary review premature, just as it was eight months ago. See 125 S. Ct. 972 (2005). Proceedings before petitioner's military commission had just begun when they were enjoined by the district court. Under the decision of the court of appeals, those

proceedings will now be allowed to continue. Further proceedings before the military commission may make it unnecessary for this Court to address any number of the questions currently presented in the case. If the commission finds petitioner not guilty, the Court can avoid these issues altogether.

Even if petitioner is convicted, many of the issues that petitioner presses now may never arise in his case. For example, petitioner objects to military commission rules providing that a defendant *may* be excused from proceedings at which classified evidence is presented. Although petitioner was excused from a portion of voir dire in which classified information was discussed, it is entirely possible that no classified evidence will be introduced by the prosecution at petitioner's trial. The classified material at issue in the voir dire was related to a recusal issue entirely collateral to the merits of the case against petitioner. It involved evidence concerning the impartiality of the commission, not evidence against the accused. Accordingly, the voir dire proceedings in no way suggest that classified evidence will be introduced against petitioner.[6] Even if such evidence is sought to be introduced, however, the commission's rules, as amended on August 31, 2005, provide for it to be shared with the defendant "to the extent consistent with na-

[6] In light of the August 31, 2005 revisions to the allocation of responsibilities between the presiding officer and the other commission members and to the number of commission members, see Revised Military Commission Order No. 1 §§ 4(A)(2), (5) and (6), the composition of petitioner's commission (other than the presiding officer) is likely to change. Accordingly, petitioner's present complaint about his exclusion from portions of the voir dire (he was not excluded from voir dire of the presiding officer) may well be rendered moot. These changes to the military commission procedures highlight why it would be unwise for this Court to review the case in this interlocutory posture.

tional security, law enforcement interests, and applicable law," and require its exclusion if "admission of such evidence would result in the denial of a full and fair trial." Revised Military Commission Order No. 1 § 6(D)(5)(b). See note 3, *supra*.

Finally, even if the commission does consider such evidence, petitioner's counsel can argue that the evidence should be given minimal or no weight in light of petitioner's inability personally to review and respond to it. 32 C.F.R. 9.6(d)(2). Then, if petitioner is convicted, and the admission of the evidence is deemed erroneous, the error would be subject to harmless-error analysis. This Court has recognized that even "constitutional errors can be harmless," *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991), and it has applied that analysis to claims similar to those advanced by petitioner. See, *e.g.*, *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986) (violation of Confrontation Clause); *Rushen* v. *Spain*, 464 U.S. 114 (1983) (per curiam) (violation of right to be present at every phase of trial). Post-trial application of the harmless-error rule might even make it unnecessary for the Court to determine whether the commission's procedures had in fact resulted in error.

For all of those reasons, review of petitioner's claims at this juncture would be premature. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (interlocutory status of the case "of itself alone furnishe[s] sufficient ground for the denial" of the petition); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari). Indeed, this Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of criminal proceedings. See Robert L. Stern et al.,

Supreme Court Practice § 4.18, at 258 n.59 (8th ed. 2002); see, *e.g.*, *Moussaoui* v. *United States*, 125 S. Ct. 1670 (2005). The rationale behind this Court's general practice in criminal cases applies with even greater force to the circumstances presented here, where the legal issues raised by petitioner would require the Court to make possibly unnecessary determinations affecting the exercise of the President's core Commander-in-Chief and foreign affairs authority.

b. Petitioner has not shown that he will be prejudiced by deferring resolution of his claims until after an adverse military-commission judgment, if he is convicted. Petitioner notes that he has been detained for several years at Guantanamo Bay. Pet. 29. But as an individual who has been determined by a Combatant Status Review Tribunal to be "either a member of or affiliated with Al Qaeda," Pet. App. 2a, petitioner is subject to detention as an enemy combatant regardless of the outcome of this litigation or whether he is ultimately convicted of a specific war crime, see *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004) (plurality opinion); *id.* at 2678-2679 (Thomas, J., dissenting); *Ex parte Quirin*, 317 U.S. 1, 28 (1942); see also Pet. App. 47a (the district court noting that petitioner "may be detained for the duration of the hostilities in Afghanistan if he has been appropriately determined to be an enemy combatant"). Petitioner was captured in Afghanistan, where military operations are ongoing. See, *e.g.*, Bryan Bender, *U.S. Endures Deadliest Year in Afghanistan*, Boston Globe, July 3, 2005 <http://www.boston.com/news/world/middleeast/articles/2005/07/03/us_endures_deadliest_year_in_afghanistan/>. Tellingly, petitioner's federal action challenged only the commission process and did not advance any legal claims challenging his

detention as an enemy combatant. See C.A. App. 56-64; Pet. App. 47a n.18.

Petitioner objects that he may be prejudiced by having to present a defense before a commission, because reversal of its judgment would result in a retrial. Pet. 28a. But this supposed burden is no different from that faced by any criminal defendant subject to trial before a tribunal that has arguably violated the defendant's rights. It provides no basis for deviating from this Court's ordinary practice of avoiding interlocutory consideration of a defendant's claims in a criminal proceeding.[7]

Petitioner misplaces reliance on *Ex parte Quirin*, 317 U.S. 1 (1942), to justify interlocutory review. The petitioners there, who included a presumed U.S. citizen captured on U.S. soil, faced imminent execution, which is not the case here. Interlocutory review there, which

---

[7] As petitioner notes (Pet. 28), the court of appeals concluded that post-trial review of his jurisdictional challenges would be insufficient to protect his "right not to be tried by a tribunal that has no jurisdiction." Pet. App. 4a. That aspect of the court of appeals' decision is anomalous, because there is no general right to interlocutory review of jurisdictional challenges, and a confirmed alien enemy combatant should have no greater right to pre-trial federal review of his challenge to military jurisdiction than an American service-member, see *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), especially when the challenge is not to military jurisdiction generally, but to the type of military tribunal in which he will be tried. See Pet. 8 ("Petitioner asks simply for a trial that comports with this nation's traditions, * * * such as a court-martial under 10 U.S.C. 818 (authorizing courts martial to try law-of-war violations)."). But even if the court of appeals were correct as to either the appropriateness of abstention or as to *its* jurisdiction over an appeal as of right, that does not inform this Court's discretionary exercise of certiorari review. The interlocutory posture of a case counsels against Supreme Court review even if the error ultimately to be corrected is of a jurisdictional dimension.

took place in the midst of proceedings, provided an alternative to staying an execution. But the Court did not intervene to stop trial proceedings from commencing to prevent the "injury" of undergoing trial by a commission of questionable jurisdiction.[8] Because petitioner faces a maximum sentence of life imprisonment, this Court will have the opportunity to review petitioner's claims at the appropriate time in the event an adverse final judgment is entered against him. See Pet. App. 16a (noting that petitioner's commission "consists of three colonels"); Revised Military Commission Order No. 1 § 6(G) (Aug. 31, 2005) (commission may sentence defendant to death only if comprised of at least seven members in addition to presiding officer).[9] Moreover, this case involves an alien enemy combatant captured abroad, a context in which the jurisdiction of military commissions has long been clear, and in which the Court has been content to resolve jurisdictional questions after a trial before the commission. See *Johnson* v. *Eisentrager*, 339 U.S. 763, 786 (1950).

While petitioner claims (Pet. 30) that the court of appeals' decision implicates "the integrity of our judicial system," there is no reason this Court could not protect the judicial system's integrity by reviewing the case in the ordinary course. That approach not only would avoid the possibility that the Court would unnecessarily

---

[8] Specifically, the Court heard the case at the close of the presentation of evidence before the commission. The Court never entered a stay, and closing arguments commenced before the Court issued its decision. See Louis Fisher, *Nazi Saboteurs on Trial* 64-79 (2003).

[9] As mentioned in note 6, *supra*, the composition of petitioner's commission is likely to change, but in all events, like his original commission, the reconstituted commission will contain less than the number of members required to impose a death sentence.

Judge Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Lieutenant Commander CHARLES SWIFT, as next friend for SALIM AHMED HAMDAN, Military Commission Detainee, Camp Echo, Guantanamo Bay Naval Base, Guantanamo, Cuba,

Petitioner,

v.

DONALD H. RUMSFELD, United States Secretary of Defense; JOHN D. ALTENBURG, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General THOMAS L. HEMINGWAY, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General JAY HOOD, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; GEORGE W. BUSH, President of the United States,

Respondents.

NO. C04-0777RSL

NOTICE OF MOTION AND MOTION FOR ORDER HOLDING PETITION IN ABEYANCE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

(Note on Motion Calendar for: May 14, 2004)

Respondents, through their attorneys, hereby move this Court for an order that the petition filed herein be held in abeyance. This motion is made on the ground that prior practice, principles of judicial economy, and considerations of inter-branch comity and separation of powers, strongly support respondents' request.

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WASHINGTON 98101-3903
(206) 553-7970

the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.").

Federal courts routinely exercise their discretion to hold cases in abeyance when an impending decision from the Supreme Court is likely to shed light on the issue(s) before them. See, e.g., United States v. Toliver, 351 F.3d 423, 429 n.3 (9th Cir. 2003) ("[W]e deferred consideration of the defendants' consolidated appeals pending [Supreme Court decision]."); Hensala v. Dep't of the Air Force, 343 F.3d 951, 955 (9th Cir. 2003) ("We ordered the submission of this case deferred pending [Supreme Court decision]."); Majors v. Abell, 361 F.3d 349, 352 (7th Cir. 2004) (deferring consideration of challenge to constitutionality of state statute until the Supreme Court decided challenge to constitutionality of "rather similar" federal law); Marshel v. AFW Fabric Corp., 552 F.2d 471, 472 (2d Cir. 1977) (per curiam) (directing district court to stay further proceedings pending Supreme Court's resolution of "closely related case" that will "in all likelihood" decide question presented).

Because the Supreme Court's impending decision in Rasul/Al Odah will be potentially dispositive of the threshold jurisdictional issue presented by the petition, and because Padilla will be potentially dispositive of the propriety of filing the petition in the Western District of Washington, this Court should hold the petition in abeyance until those cases are decided. Indeed, it would be an unnecessary expenditure of resources for the parties to litigate – and for this Court to adjudicate – the very same jurisdictional issues the Supreme Court is virtually certain to address over the next two months and resolve in a manner that will dispose of this petition or, at a minimum, provide substantial guidance regarding its viability in the federal courts and the Western District of Washington in particular.

Not only do the interests in judicial economy and conservation of resources tip decidedly in favor of temporarily suspending these proceedings, but the prejudice to Hamdan is also minimal. The Supreme Court is expected – in accordance with its custom of deciding argued cases before its summer recess – to hand down its decisions in Rasul/Al Odah and Padilla by the end of June, little more than two months from now. Those decisions either will require the outright dismissal or transfer of the petition or, if they do not, will considerably

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WASHINGTON 98101-3903
(206) 553-7970

narrow the issues that this Court must address in the motion to dismiss that respondents intend to file. Either way, Hamdan suffers little by deferring proceedings briefly until the Supreme Court rules. And, at the same time, both parties, not to mention the Court, are likely to benefit from the guidance provided by those decisions in framing and resolving the threshold issues presented by the petition in this case.

Finally, especially where these matters are pending before the Supreme Court, requiring the Executive to respond at this time to the petition in this case filed on behalf of an alien held abroad in connection with ongoing hostilities raises inter-branch comity and separation-of-powers concerns. The Court may avoid those concerns simply by holding this case in abeyance for the relatively brief period until the Supreme Court issues its decisions in Al Odah/Rasul and Padilla.

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WASHINGTON 98101-3903
(206) 553-7970

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. HICKS, Petitioner, v. GEORGE W. BUSH, President of the United States; DONALD RUMSFELD, United States Secretary of Defense; GORDON R. ENGLAND, Secretary of the United States Navy; JOHN D. ALTENBURG, JR., Appointing Authority for Military Commissions, Department of Defense; Brigadier General JAY HOOD, Commander, Joint Task Force, Guantanamo Bay, Cuba, and Colonel BRICE A. GYURISKO, Commander, Joint Detention Operations Group, Joint Task, Guantanamo Bay, Cuba Respondents, all sued in their individual and official capacities.	Civ. Act. No. 1:02-cv-00299-CKK Judge Kollar-Kotelly

PETITIONER DAVID M. HICKS'S
ERRATA SHEET IN SUPPORT OF
MOTION TO STAY MILITARY COMMISSION PROCEEDINGS

On November 8, 2005, Petitioner David M. Hicks, by his counsel, filed his Motion to Stay Military Commission Proceedings which appears on the Court's Docket as entry number 194. Petitioner inadvertently failed to include a proposed order with that filing and has therefore attached it here.

Dated: November 9, 2005

Respectfully submitted,
David M. Hicks

By: /s/ Marc Goldman
One of His Attorneys

Marc A. Goldman, Esq.
District Bar No. 449230
Michael B. DeSanctis

Eric Berger
Jenner & Block LLP
601 13th St. N.W. Suite 1200 South
Washington, D.C. 20005-3823
(202) 639-6087

Andrew A. Jacobson
David E. Walters
Andrew W. Vail
pro hac vice
Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

Joshua L. Dratel, Esq.
Joshua L. Dratel, P.C.
Civilian Defense Counsel
pro hac vice
14 Wall Street, 28th Floor
New York, New York 10005
(212) 732-0707
Attorney Registration No. 1795954
Attorneys for Petitioner David M. Hicks

Leon Friedman, Esq.
District Bar No. NY0028
148 East 78th Street
New York, New York 10021
(212) 737-0400

Major Michel D. Mori,
U.S. Marine Corps
pro hac vice
Office of Military Commissions
Office of the Chief Defense Counsel
1931 Jefferson Davis Highway, Suite 103
Arlington, Virginia 22202
(703) 607-1521

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. HICKS, Petitioner, v. GEORGE W. BUSH, President of the United States; DONALD RUMSFELD, United States Secretary of Defense; GORDON R. ENGLAND, Secretary of the United States Navy; JOHN D. ALTENBURG, JR., Appointing Authority for Military Commissions, Department of Defense; Brigadier General JAY HOOD, Commander, Joint Task Force, Guantanamo Bay, Cuba, and Colonel BRICE A. GYURISKO, Commander, Joint Detention Operations Group, Joint Task, Guantanamo Bay, Cuba Respondents, all sued in their individual and official capacities.	Civ. Act. No. 1:02-cv-00299-CKK Judge Kollar-Kotelly

ORDER

Upon consideration of Petitioner David M. Hicks's Motion to Stay Military Commission Proceedings and Respondents' answer thereto, it is, this _____ day of November 2005, hereby

ORDERED that the motion be, and the same hereby is, GRANTED. Military Commission proceedings against Petitioner shall be stayed until the later of this Court's decision on Mr. Hicks's Motion for Partial Summary Judgment or the United States Supreme Court's decision in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted* 74 U.S.L.W. 3108 (U.S. Nov. 7, 2005) (No. 05-184).

IT IS SO ORDERED.

_____
COLLEEN KOLLAR-KOTELLY
United States District Judge